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In the Supreme Court

of the

United States

OCTOBER TERM, 1967

No. 1059

SOUTHERN PACIFIC LAND COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner, Southern Pacific Land Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above matter.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 367 F.2d at page 161. It is reprinted in the appendix hereto. A memorandum opinion of the District Court for the Southern District of California, Northern Division, is not reported. It is reprinted in the appendix hereto.

JURISDICTION

This action was brought by the United States for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest. The appeal was taken by Southern Pacific Land Company.

The judgment of the Court of Appeals was entered on October 12, 1966. A Petition for Rehearing was filed on November 10, 1966, and was denied on November 18, 1966. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Respondent, United States of America, sought to condemn the fee title to lands owned by petitioner, Southern Pacific Land Company, for military and naval purposes connected with a naval air station at Lemoore, California. The undisputed testimony of Mr. F. A. Bantz, the Assistant Secretary of the Navy, who made the decision to condemn these properties and who prepared and signed the Declaration of Taking, was that the use of any oil, gas or minerals underlying these properties would be inconsistent with the military and naval purposes of the air base, that such use was not contemplated by the Navy, and that the use of such oil, gas and mineral rights was in no way incidental to the military and naval purposes for which the properties were condemned.

Petitioner did not object to the taking of the surface rights but did file an answer objecting to the taking of the oil, gas and mineral rights on the ground that such taking was not for the public use authorized and stated in the Declaration of Taking and alleging that such taking was unreasonable, capricious, arbitrary and an abuse of discretion, amounting to a confiscation of petitioner's property

and depriving petitioner of its property without due process of law. The United States refused to present any evidence in opposition to these defenses, taking the position that the District Court had no jurisdiction to review the decision of the Assistant Secretary of the Navy to take the oil, gas and mineral rights or to pass upon the defenses raised by petitioner. The District Court found for respondent, basing its decision entirely upon lack of jurisdiction. The Court of Appeals refused to determine the question of jurisdiction but nevertheless confirmed the judgment of the District Court. The questions presented are:

1. Under these circumstances and under constitutional guarantees of due process and the protection of private property rights, does a federal court have jurisdiction to review a decision of an officer of an executive branch of government to take private property where it is pleaded that his decision to take the property is beyond his statutory authority and is unreasonable, capricious, arbitrary, in abuse of his discretion, and in bad faith?

2. Under these circumstances, are the parties to this action entitled to a final decision of this court on this question of jurisdiction?

3. Under these circumstances, was the decision to take the oil, gas and mineral rights without authority or arbitrary or capricious or in bad faith or an abuse of discretion?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of United States, Amendment V.

Condemnation of Realty for Sites and Other Uses, 40 U.S.C.A., Section 257.

Declaration of Taking Act, 40 U.S.C.A., Section 258a.

Public Law 968, 70 U. S. Stat. 991.

(See Appendix for text)

STATEMENT OF THE CASE

On January 9, 1958, the United States filed a Declaration of Taking signed by F. A. Bantz, Assistant Secretary of the Navy, wherein it was stated that the United States took the fee title to the lands in question "for military and naval purposes for the establishment of a Naval Air Station at Lemoore, California" (Declaration of Taking, Tr. of Rec. p. 225). The Declaration of Taking was filed under and by virtue of the Declaration of Taking Act (40 U.S.C.A. Section 258a) *which expressly requires the Declaration of Taking to contain "a statement of the authority under which and the public use for which said lands are taken."*

On the same day, the United States filed a Complaint in Condemnation to condemn the fee title in the lands so taken for the purpose stated in the Declaration of Taking (Complaint in Condemnation, Tr. of Rec. p. 2). The District Court had jurisdiction of the action under 28 U.S.C.A. Sections 1345 and 1358. The Court of Appeals had jurisdiction under 28 U.S.C.A. Section 1294.

The action was brought at the request of Mr. Bantz under the direction of the Attorney General of the United States and under the authority of Public Law 968 (United States Statutes, Volume 70, Chapter 939) enacted by the Congress of the United States on August 3, 1956. The only authorization therein given applicable to this case was to acquire property to establish or develop military installations and facilities for a naval air station at Lemoore, California.

Thus, it is clear that the Assistant Secretary of the Navy had no authority to condemn any separate or severable estate in lands owned by Southern Pacific Land Company for any use other than military and naval uses incidental to the establishment of Lemoore Naval Air Station.

On March 18, 1958, Southern Pacific Land Company answered the complaint, claiming just compensation for the taking of the surface rights in said lands but objecting to the taking of the oil, gas and mineral rights on the ground that the taking of those rights was not for the public use stated in the Declaration of Taking or necessary for the needs or requirements of the Naval Air Station at Lemoore or for any military use incidental thereto, and that the taking was unreasonable, capricious, arbitrary, an abuse of discretion and in violation of the Fifth Amendment to the Constitution (Tr. of Rec. p. 360). *Southern Pacific Land Company stated its willingness to have any reservation of the oil, gas and mineral rights in its favor subjected to all such reasonable limitations or restrictions on the drilling, exploration for or production of oil, gas or minerals as the United States might see fit to impose during the period of time that the land was used by the United States as a Naval Air Station or for any other military use* (Tr. of Rec. p. 360).

The United States moved to strike these defenses from the answer upon the ground that the court had no jurisdiction to review the decision to take or to determine those defenses (Tr. of Rec. p. 366). The motion was denied (Tr. of Rec. p. 383). In denying the motion, Judge Peirson Hall stated that "public use" was a judicial question and that "since the whole includes the sum of all its parts, and since the question of public use can be raised as to the whole taking, (there is) no reason why it cannot be raised as to a part of the whole." Judge Hall further stated that the allegations of the answer that the taking was arbitrary and unreasonable were sufficient to put the Government to its proof that the taking was for a public use (Tr. of Rec. p. 384).

On April 17, 1959, the United States filed a petition for reconsideration of Judge Hall's order and for a partial

summary judgment (Tr. of Rec. pp. 386 and 388 and p. 403). On June 26, 1959, Judge Hall filed a memorandum order putting the motion for summary judgment off calendar, to be reset after the report of Commissioners appointed by the court determining the presence and value, if any, of oil, gas and mineral deposits. Judge Hall stated the time would then be sufficient to consider the issue of public use raised by petitioner (Tr. of Rec. p. 665).

Thereafter the Commissioners were discharged. Judge M. D. Crocker replaced Judge Hall as the trial judge and the United States again moved for a reconsideration of respondent's motion to strike these defenses. This motion was heard by Judge Crocker and on May 3, 1961, Judge Crocker made his order denying the motion (Tr. of Rec. p. 703).

Prior to the trial of the action, respondent and petitioner settled all issues of just compensation by a written stipulation fixing the amount of just compensation to be awarded to Southern Pacific Land Company and providing that the fixing of such amount was by way of compromise and settlement of that issue alone; that in determining other issues in the case it should not be presumed or inferred that the amount so fixed included or did not include any amount for oil, gas and mineral rights; and that neither the stipulation nor the award of the amount so fixed as just compensation should be considered as in any way determining whether the United States was or was not entitled to take the oil, gas and mineral rights (Tr. of Rec. p. 714).

The case went to trial solely on the taking of the mineral rights, and at the commencement of the trial the United States Attorney moved that the motion of the United States for a partial summary judgment be placed back on calendar and determined. The motion for partial summary judgment was argued at length (R. Tr. pp. 4-23) and was denied (Tr. of Rec. p. 726).

During the trial the United States Attorney objected at every stage of the proceedings to all evidence upon the subject of the taking of the mineral rights upon the jurisdictional ground. The objections were overruled and the United States Attorney refused to introduce evidence on behalf of the United States, relying entirely upon his claim that the court had no jurisdiction (R. Tr. pp. 23, 131 and at various other stages of the proceedings).

Petitioner presented its evidence, including the testimony of Mr. Bantz that any exploration for or production of oil, gas or minerals on the properties would be inconsistent with the military and naval purposes of the air base, that no such use was contemplated by the Navy and that the use of the oil, gas and mineral rights was in no way incidental to the military and naval purposes for which the properties were condemned. At the close of the trial, petitioner again invited the imposition upon it of such reasonable limitations or restrictions on the drilling, exploration and production of oil, gas or other minerals as the parties by agreement or the court in its discretion might impose upon it so long as the lands were used by the United States as a Naval Air Station (R. Tr. p. 157). The case was submitted to the court for its decision upon this evidence.

On October 16, 1964, Judge Crocker filed his findings of fact and conclusions of law wherein he concluded that the court had no jurisdiction to review or interfere with the decision of the Assistant Secretary of the Navy to take the oil, gas and mineral rights or to pass upon or determine the defenses raised by petitioner to the taking of the oil, gas and mineral rights (Tr. of Rec. pp. 732 and 737). Based upon this finding and this conclusion, Judge Crocker rendered his judgment that the entire fee title to the lands in question, including all oil, gas and

mineral rights, vested in the United States upon the filing of the Declaration of Taking (Tr. of Rec. pp. 739-743).

It was from this conclusion and this portion of the judgment that petitioner appealed.

REASONS FOR GRANTING WRIT OF CERTIORARI

A. The Decision of the Court of Appeals Involves an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

From the commencement of this action, the United States has relied entirely upon its position that the Declaration of Taking was final and that the court had no jurisdiction to review the taking or to pass upon the allegation that the taking was in bad faith, arbitrary, capricious and an abuse of discretion. Its confidence in this position and its desire for a final decision to this effect is demonstrated by the fact that it stipulated to a judgment fixing the fair market value of the property taken at $1,250,000.00 without determining the ownership of the mineral rights (which by the undisputed testimony in the case were valued at $229,847.00), leaving open for judicial determination the question of the taking of those rights.

Prior to trial the United States unsuccessfully filed successive motions based upon the premise that as a matter of law the court had no jurisdiction to review the taking.

At the trial the United States again chose to rely entirely upon lack of jurisdiction and refused to cross-examine any of petitioner's witnesses or to present any evidence on its own behalf. Obviously, it considered a final decision on this subject of greater importance than obtaining the rights themselves.

Southern Pacific Land Company was equally anxious to have a decision in its favor upon this question. It also stipulated to the fair market value of the whole property, leaving open the question of the court's jurisdiction, thereby taking the risk of losing the oil, gas and mineral rights without further compensation. It then presented complete evidence in support of its defense, including the testimony of the Assistant Secretary of the Navy before referred to. The entire record is before this Court.

The District Court joined with the parties in this effort to obtain a clear-cut decision on jurisdiction. Its judgment was based entirely upon an express written finding that it did not have jurisdiction. It made no finding upon whether the Assistant Secretary of the Navy acted in good faith or whether he acted arbitrarily or capriciously or in abuse of his discretion.

The reason the parties and the trial court placed so much importance on the final answer to this question is clear. If the courts have jurisdiction to review an arbitrary, capricious or unreasonable taking of property, the United States must always consider the possibility of such a review in making a decision to take property. On the other hand, every time such a decision is made the landowner is faced with the question of the court's jurisdiction in determining whether he can resist the taking or whether he must accept the decision to take regardless of how arbitrary, capricious or unreasonable it may be. It is essential to both the United States and to all owners of private property that the answer to this question be finally determined.

The number of decisions upon the subject and the conflict in those decisions demonstrate the unsatisfactory state of the law. This conflict is clearly demonstrated

by the following excerpt from the decision of the Court of Appeals in the present case:

> "The Government urges us to adopt the district court's holding that when the taking as a whole is for an authorized public purpose the administrative agency's decision as to the necessity for taking particular property or a particular interest in property is not subject to judicial review.
>
> "A substantial argument can be made for this position, based upon the Supreme Court's decision in *Berman v. Parker,* 348 U.S. 26, 36 (1954), and upon such court of appeals decisions as *2953.15 Acres of Land v. United States,* 350 F.2d 356, 360 (5th Cir. 1965); *United States v. Mischke,* 285 F.2d 628, 631-33 (8th Cir. 1961); *United States v. Brondum,* 272 F.2d 642, 646 (5th Cir. 1959); *United States v. South Dakota,* 212 F.2d 14 (8th Cir. 1954); *United States v. Kansas City,* 159 F.2d 125, 129 (10th Cir. 1946); and *United States v. 6.74 Acres of Land,* 148 F.2d 618, 619-20 (5th Cir. 1945). It is no doubt significant that in each instance in which a lower court set aside a federal agency's determination that it was necessary to take particular property or a particular interest in property, the lower court's ruling was reversed on appeal.
>
> "But the Supreme Court itself has declined to rule out the possibility of judicial review where the administrative decision to condemn a particular property or property interest is alleged to be arbitrary, capricious, or in bad faith. *United States v. Carmack,* 329 U.S. 230, 243-44 (1946). And various courts of appeal, including this one, have *said* that an exception to judicial non-reviewability exists in such circumstances. *Simmonds v. United States,* 199 F.2d 305, 306-07 (9th Cir. 1952); *United States v. 64.88 Acres of Land,* 244 F.2d 534, 536 (3rd Cir. 1957); *United States v. Certain Real Estate,* 217 F.2d 920, 926-27 (6th Cir. 1954); *United States v. Certain Parcels of Land,* 215 F.2d 140, 147 (3rd Cir. 1954); and

United States v. Meyer, 113 F.2d 387, 392 (7th Cir. 1940). See also *Wilson v. United States,* 350 F.2d 901, 906-07 (10th Cir. 1965); *United States v. 91.69 Acres of Land,* 334 F.2d 229, 231 (4th Cir. 1964); and *United States v. New York,* 160 F.2d 479, 480 (2d Cir. 1947). Moreover, limited judicial review of administrative exercise of condemning authority may well be required by section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009."

As above stated, this court has left the question undecided. In its last decision in which the question was raised, *United States v. Carmack,* 329 U.S. 230, 67 Sup. Ct. 252, this court only determined that the question had not been properly placed at issue by the pleadings and said:

> "In this case, it is unnecessary to determine whether or not this selection could have been set aside by the courts as unauthorized by Congress if the designated officials had acted in bad faith or so 'capriciously and arbitrarily' that their action was without adequate determining principle or was unreasoned. The record presents no such issue here." (p. 243)

In the present case the charge of bad faith and of capricious, arbitrary and unreasonable action on the part of the Assistant Secretary of the Navy was placed directly before the Court of Appeals by the pleadings in the case, by the stipulation of the parties, by the manner in which the case was tried, and by the decision of the District Court, and the Court of Appeals actually recognized its right to pass upon these charges by reviewing the evidence and concluding that Southern Pacific Land Company had failed to prove that the decision of the Assistant Secretary of the Navy was arbitrary, capricious or in bad faith. If the courts have no jurisdiction to review

such a decision, the Court of Appeals in this case had no jurisdiction to reach this conclusion.

However, the Court of Appeals expressly stated that it "need not decide" the question of jurisdiction and expressly left that question open. We respectfully submit that it *was* necessary for the Court of Appeals to decide this question before it could review the evidence and determine that the decision of the Assistant Secretary of the Navy did not act in bad faith or arbitrarily or capriciously.

The decision of the Court of Appeals does involve an important question of federal law that has not been, but should be, settled by this court.

B. The Decision of the Court of Appeals Is in Conflict With the Decision of This Court in City of Cincinnati v. Vester, 281 U.S. 439, 50 Sup. Ct. 360.

In principle, the decision of this court in *City of Cincinnati v. Vester*, 281 U.S. 439, 50 Sup. Ct. 360, is directly in point in this case. The City of Cincinnati condemned property for street widening purposes. The determination to take the property was by a resolution of the City council and by this ordinance the city also sought to condemn a twenty-five-foot width of land adjacent to the street which would be beyond the boundaries of the street even as widened and which would obviously not be needed for that purpose. A statute required the public body in making such a condemnation to define the public purpose for which the appropriation was to be made. The ordinance enacted pursuant to the statute stated that the condemnation, including the excess lands, was "in furtherance of said widening and necessary for the complete enjoyment and preservation of the benefits to accrue from the public use."

The Supreme Court held that under the provisions of the Constitution protecting the owner of private property against its taking without due process of law, the question of public use must be and is a judicial one. It then held that in exercising its discretion to declare that a condemnation was for a public use, the condemning authority must state the public purpose for which the specific estate is taken in sufficient detail that a court may properly pass upon the subject, that if excess land not needed for the principal purpose is taken the foregoing requirement applies to the excess appropriation as well as the principal appropriation, and that in the case there under consideration neither the general language used in the ordinance nor the suggestion by the city that the purposes of the project might be advanced by a future sale of the excess property, was sufficient to support the taking. In affirming the decision of the Circuit Court the Supreme Court said:

> "It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one. In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution." (p. 446)
>
> "We are thus asked to sustain the excess appropriation in these cases upon the bare statements of the resolution and ordinance of the City Council, by considering hypothetically every possible, but unde-

fined, use to which the City may put these properties, and by determining that such use will not be repugnant to the rights secured to the property owners by the Fourteenth Amendment. We are thus either to assume that whatever the City, entirely uncontrolled by any specific statement of its purpose, may decide to do with the properties appropriated, will be valid under both the state and Federal constitutions, or to set up some hypothesis as to use and decide for or against the taking accordingly, although the assumption may be found to be foreign to the actual purpose of the appropriation as ultimately disclosed and the appropriation may thus be sustained or defeated through a misconception of fact." (p. 446)

"To the end that the taking shall be shown to be within its authority, the municipality is called upon to specify definitely the purpose of the appropriation. This is the clear import of the provision of the Ohio statute (Ohio General Code, sec. 3679, *supra*) that the City Council, when it is deemed necessary to appropriate property, shall pass a resolution 'defining the purpose of the appropriation.' It can not be said that this legislative requirement relates only to the principal appropriation and not to the excess appropriation. It must be deemed to apply, according to its express terms, to every appropriation of private property by a municipality. The importance of the definition of purpose would be even greater in the case of taking property not directly to be occupied by a proposed public improvement than in the case of the latter which might more clearly speak for itself.

"The general declaration of the resolution of the City Council, and of the ordinance if that may be read with the resolution, for the excess condemnation in the present cases, is plainly not a definition. To define is to limit, and that which is left unlimited, and is to be determined only by such future action

> as the City may hereafter decide upon, is not defined. The City's contention is so broad that it defeats itself. It is not enough that property may be devoted hereafter to a public use for which there could have been an appropriate condemnation. Under the guise of an excess condemnation pursuant to the authority of the constitutional provision of Ohio, private property could not be taken for some independent and undisclosed public use." (pp. 447-48)

In the *Cincinnati* case, the city attempted to condemn an estate in real property lying horizontally contiguous to the estate it actually intended to use for a public purpose. In the present case the United States is attempting to condemn an estate in real property lying vertically contiguous to the estate it intends to use for the public purpose. There is no logical distinction between the cases. (See decision of Judge Peirson Hall in denying respondent's motion to strike defenses in the case at bar (Tr. of Rec. p. 384). See also *United States v. 4.5538 Acres of Land,* 208 F. Supp. 127.)

In *Cincinnati,* a statute required the city to state by ordinance the public purpose for which the property was to be condemned. In the present case, the Declaration of Taking Act requires the United States to state in the Declaration of Taking the public purpose for which the property was to be condemned.

In *Cincinnati,* the Supreme Court held that the city's power to condemn was limited to the purpose stated in the ordinance. In the present case, the power of the United States to condemn is limited to the purpose stated in the Declaration of Taking and the Assistant Secretary of the Navy frankly admits the oil, gas and mineral rights were not to be used for that purpose.

In *Cincinnati*, the Court exercised its jurisdiction to deny the taking where the evidence demonstrated that the excess estate was not required for or taken for the public use stated in the ordinance. In the present case, petitioner asks the Court to exercise its jurisdiction to deny the taking of the excess estate where it is not required for and is not taken for the purpose stated in the Declaration of Taking.

In the present case, the Assistant Secretary of the Navy, conceding that the extraction of oil, gas or other minerals would be inconsistent with the establishment of a naval air station, attempted to justify the taking of those rights upon the assumption that the ownership of the mineral rights might enhance the property's marketability if some time in the future the Navy no longer needed the property for a naval air station and wished to sell it. The United States presented no evidence to support this assumption and the only evidence upon the subject was the testimony of Mr. Kenneth R. Evans, above referred to, that out of the 37 transfers of property in the area investigated by him the mineral rights had been severed from the surface rights by reservations in practically every instance. If any inference at all may be drawn from this evidence it would be that where farming land such as this is sold in the ordinary course of business it can be sold at least as easily without the mineral rights. This would be true because it could be sold for a lower price per acre. We submit that a decision to take private property in excess of that required for an authorized use, which in its very nature cannot be used for such authorized use, cannot be justified upon the remote possibility that at some time in the distant future when and if the purpose for which the property was condemned no longer exists, the inclusion of the excess property might possibly make the entire property more easily saleable.

In *Cincinnati v. Vester, supra,* the city sought to justify the condemnation upon the ground that the city might in the future recoup some of the expense of the project from anticipated increasing values of the land. This Court in that case said:

> ". . . if the provision means that property may be taken 'for the purpose of selling it at a profit and paying for the improvement it is clearly invalid.' " (p. 445)

The Court of Appeals attempts to distinguish the *Cincinnati* case by citing the statement of Mr. Justice Black in *United States ex rel. T.V.A. v. Welch,* 327 U.S. 546 at 552 (66 Sup. Ct. 715) that "the Court's judgment in that case [the *Cincinnati* case] denied the power to condemn 'excess' property on the ground that the state law had not authorized it." This is not a distinguishing point in the case at bar. In the *Cincinnati* case, the statute did not authorize the taking for any purpose for which the excess property was to be used. In the present case, neither the statute nor the Declaration of Taking authorized the taking for any purpose for which the oil, gas and mineral rights could be used.

It is also claimed that the *Cincinnati* case is distinguishable on the ground that it involved the Fourteenth Amendment rather than the Fifth Amendment. Both Amendments contain the identical prohibition against depriving any person of property without due process of law. The Federal Government has no greater power to deprive a citizen of his property without due process of law than has a state or a municipality.

It should also be noted that in the *Welch* case Mr. Justice Reed concurred in the decision but refused to join in the opinion because it might be construed as holding that "there is no judicial review of the Authority's determination that acquisition of these isolated pieces of private property

is within the purposes of the TVA Act." Chief Justice Warren agreed with Mr. Justice Reed. Mr. Justice Frankfurter joined in the opinion of the Court only upon the ground that he did not believe it might be construed as feared by Mr. Justice Reed. Mr. Justice Frankfurter stated his views as follows:

> ". . . This Court has never deviated from the view that under the Constitution a claim that a taking is not 'for public use' is open for judicial determination, ultimately by this Court." (p. 557)

The *Cincinnati* case is direct authority, first, that a federal court *will* review the decision of a governmental agency to take private property where it appears that the property cannot be used for the purpose stated in the statute permitting the taking; and, second, that such a taking will not be confirmed upon bare statements of "undefined" or "hypothetical" uses such as were and are relied upon in the *Cincinnati* case and in the case at bar.

Petitioner submits that the decision of the Court of Appeals confirming the taking of the oil, gas and mineral rights under the facts and evidence here presented is in direct conflict with that decision. This conflict constitutes an urgent ground for review by this Court under Rule 19(b) of the Rules of the Supreme Court.

C. The Decision of the Court of Appeals Is in Conflict With the Decisions of Other Courts of Appeals.

At page 2 of its opinion, the Court of Appeals points to the conflict in the decisions of other circuits concerning the right of judicial review of the decision of an administrative agency to take particular property in condemnation. The very conflict between the decisions cited by the Court of Appeals, taken together with the fact that the Court of

Appeals does not purport to decide that conflict but nevertheless does review the evidence and determine that the decision of the Assistant Secretary of the Navy was not arbitrary or capricious or in bad faith, constitutes a separate ground for certiorari under Rule 19 which provides that the Supreme Court will consider as a ground for review on writ of certiorari the fact that the Court of Appeals has rendered a decision in conflict with decision of other Courts of Appeals on the same matter.

D. The Court of Appeals Erred in Stating That the District Court Held That There Was No Evidence to Support the Allegations of Bad Faith or Arbitrary or Capricious Conduct.

At page 2 of its opinion, the Court of Appeals states that the District Court held that there was no evidence to support an allegation that the Assistant Secretary of the Navy acted in bad faith or arbitrarily or capriciously. The District Court did not so hold.

The decision of the District Court is found in its formal findings of fact, conclusions of law and judgment. The finding upon which the judgment is based was that the court had no jurisdiction to review the decision of the Assistant Secretary of the Navy. Consistent with this finding there was no finding as to whether that decision was or was not in bad faith or arbitrary or capricious.

In its memorandum opinion filed prior to signing and filing formal findings, the District Court did state in passing that it found no evidence to support the allegations of bad faith or arbitrary or capricious conduct. The Court of Appeals states that it may properly consider this memorandum opinion where it is *consistent* with the formal findings. The obvious answer is that in this respect the memorandum opinion is *inconsistent* with the formal findings. Clearly, any statement of the District Court which

purports to review the evidence is inconsistent with the finding that it had no jurisdiction to review that evidence. The District Judge understood this because in making the statement quoted by the Court of Appeals he said:

> ". . . however, since it is the opinion of this court that no jurisdiction exists to review the Secretary's action further discussion of this point is unnecessary." (p. 8)

It should also be pointed out that the statement that there was no evidence to support the allegations of bad faith and arbitrary and capricious conduct is not supported by the record before the Court. We submit that where an officer of the federal government decides to take private property knowing that its use is completely incompatible with the use for which he is authorized to take the property, and testifies that the United States has no intention of using the property for that purpose; and the United States then attempts to justify the taking solely upon the ground that there is no limitation upon its power to take, that the court has no jurisdiction to protect the landowner, and that such a taking is no business of the court, there is evidence that the taking was in bad faith and was arbitrary and capricious. To hold to the contrary is to ignore the record.

CONCLUSION

For the reasons stated above, this Court should grant the petition and issue a writ of certiorari to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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CERIFICATE OF SERVICE

I, ROY JEROME, one of the attorneys for Southern Pacific Land Company, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 10th day of February, 1967, I served copies of the foregoing Petition for a Writ of Certiorari on the United States, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to the following:

1. Honorable Thurgood Marshall, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530;

2. Mr. Edwin L. Weisl, Jr., Assistant Attorney General, Department of Justice, Washington, D. C. 20530;

3. Mr. Roger P. Marquis, Attorney, Department of Justice, Washington, D. C. 20530;

4. Mr. Manuel L. Real, United States Attorney, 821 Federal Building, Los Angeles, California 90012;

5. Mr. Richard J. Dauber, Assistant United States Attorney, 821 Federal Building, Los Angeles, California 90012.

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(Appendix Follows)

Appendix

Opinion of the Court of Appeals

United States Court of Appeals
for the Ninth Circuit

No. 19,882

Southern Pacific Land Company,
Appellant,

vs.

United States of America,
Appellee.

[October 12, 1966]

Appeal from the United States District Court
for the Southern District of California
Northern Division

Before: Hamley, Browning and Duniway, Circuit Judges

Browning, Circuit Judge:

The United States seeks to condemn the fee simple title to 17,750 acres of land, including the mineral interests, for the construction of a naval air station near Lemoore, California. The Southern Pacific Land Company, owning 4,600 of these acres, contends that the mineral interests in the property cannot be taken. The Company argues that property may be taken only for a public purpose; that the only public purpose involved was the construction of a naval air station; that the Assistant Secretary did not determine that the taking of the mineral rights in the Company's lands was necessary for that purpose; and if he had, his determina-

tion would have been arbitrary and capricious, and an abuse of discretion, because the Company is willing to agree not to exploit these mineral rights unless and until it becomes possible to do so without interfering with the operation of the naval air station.

The district court held that since the establishment of a naval air station was a public use the inquiry must end there. "The extent, nature or estate to be acquired," the court held, "is solely within the province of the Assistant Secretary of the Navy by delegation from Congress and is not subject to judicial review." The district court went on, however, to hold there was "no evidence to support an allegation that the Assistant Secretary of the Navy acted in bad faith or arbitrarily or capriciously."[1]

The Government urges us to adopt the district court's holding that when the taking as a whole is for an authorized public purpose the administrative agency's decision as to the necessity for taking particular property or a particular interest in property is not subject to judicial review.

A substantial argument can be made for this position, based upon the Supreme Court's decision in *Berman v. Parker*, 348 U.S. 26, 36 (1954), and upon such court of appeals decisions as *2953.15 Acres of Land v. United States*, 350 F.2d 356, 360 (5th Cir. 1965); *United States v. Mischke*, 285 F.2d 628, 631-33 (8th Cir. 1961); *United States v. Brondum*, 272 F.2d 642, 646 (5th Cir. 1959); *United States v. South Dakota*, 212 F.2d 14 (8th Cir. 1954); *United States*

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1. The latter finding appears in the district court's memorandum opinion, but not in the formal findings prepared by the Government and signed by the court. We may properly consider the opinion's finding where, as here, it is direct and clear and consistent with the formal findings, serving merely to supplement them. *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640, 642 (9th Cir. 1961); *Stone v. Farnell*, 239 F.2d 750, 754-55 (9th Cir. 1956).

v. Kansas City, 159 F.2d 125, 129 (10th Cir. 1946); and *United States v. 6.74 Acres of Land,* 148 F.2d 618, 619-20 (5th Cir. 1945). It is no doubt significant that in each instance in which a lower court set aside a federal agency's determination that it was necessary to take particular property or a particular interest in property, the lower court's ruling was reversed on appeal.

But the Supreme Court itself has declined to rule out the possibility of judicial review where the administrative decision to condemn a particular property or property interest is alleged to be arbitrary, capricious, or in bad faith. *United States v. Carmack,* 329 U.S. 230, 243-44 (1946). And various courts of appeal, including this one, have *said* that an exception to judicial non-reviewability exists in such circumstances. *Simmonds v. United States,* 199 F.2d 305, 306-07 (9th Cir. 1952); *United States v. 64.88 Acres of Land,* 244 F.2d 534, 536 (3rd Cir. 1957); *United States v. Certain Real Estate,* 217 F.2d 920, 926-27 (6th Cir. 1954); *United States v. Certain Parcels of Land,* 215 F.2d 140, 147 (3rd Cir. 1954); and *United States v. Meyer,* 113 F.2d 387, 392 (7th Cir. 1940). See also *Wilson v. United States,* 350 F.2d 901, 906-07 (10th Cir. 1965); *United States v. 91.69 Acres of Land,* 334 F.2d 229, 231 (4th Cir. 1964); and *United States v. New York,* 160 F.2d 479, 480 (2d Cir. 1947). Moreover, limited judicial review of administrative exercise of condemning authority may well be required by section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009.

We need not decide the question, however, for even if we were to hold that a limited power of review exists, we would nevertheless affirm the judgment, since we agree with the district court that the Company failed to show that the decision to take its mineral rights was arbitrary, capricious, or made in bad faith.

An assistant Secretary of the Navy testified on deposition that extraction of the oil, gas or other minerals would be inconsistent with the establishment of the naval air station, and was not contemplated when the declaration of taking was filed. He testified that the mineral rights were included in the taking "to protect the government" in the event the property should no longer be needed for a naval air station at some time in the future.

In this eventuality the Assistant Secretary envisioned two possibilities. (1) If it were decided to sell the property, ownership of the mineral rights would enhance the property's marketability. Asked whether he had in mind "protecting the government in the sense of an investor," he responded, "not necessarily. Making it that much easier to sell. Part of it would be the investment, of course, but that wouldn't be the only factor." (2) If it were decided to retain the property, the Government might wish to extract the minerals, for [I]f oil can be produced from this land, who knows, in the case of emergency the government may need some additional production."

As noted, the uncontradicted testimony of the Assistant Secretary was that he based his decision in part upon the fact that the existence of outstanding mineral interests, conflicting with possible surface uses, would reduce the marketability of the property in the event of sale. Advantageous liquidation of the Government's investment is a legitimate consideration in determining the estate to be taken. *Lewis v. United States,* 200 F.2d 183, 185 (9th Cir. 1952); *Simmonds v. United States,* 199 F.2d 305, 306 (9th Cir. 1952); *Cf. Sweet v. Rechel,* 159 U.S. 380, 394-95 (1895). Here the Government was not engaging in "an outside land speculation," (*Brown v. United States,* 263 U.S. 78, 84 (1923)); and "we must regard appropriate liquidation of an invest-

ment for a public purpose as itself such a public aim," *United States v. New York, supra,* 160 F.2d at 481.[2]

This is but an application of the general principle that "The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost." *United States ex rel. TVA v. Welch,* 327 U.S. 546, 554 (1946). See also *Wilson v. United States, supra,* 350 F.2d at 907; *United States v. Agee,* 322 F.2d 139, 142 (6th Cir. 1963).

A decision to take, based in substantial part upon this consideration is not arbitrary or capricious.[3] Affirmed.

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2. The Company relies heavily upon *Cincinnati v. Vester,* 281 U.S. 439 (1930). As Justice Black pointed out in *United States ex rel. TVA v. Welch, supra,* 327 U.S. at 552, "the Court's judgment in that case denied the power to condemn 'excess' property on the ground that the state law had not authorized it," and nothing more.

3. Since one of the considerations motivating the Assistant Secretary afforded a principal basis for his decision, we need not determine whether the other reasons given for his decision would also have sufficed. *United States v. Montana,* 134 F.2d 194, 196-97 (9th Cir. 1943).

Memorandum Decision of District Court

In the United States District Court
Southern District of California
Northern Division

No. 1836-ND

United States of America,
Plaintiff,

vs.

19,752 Acres of Land, More or Less, in Kings and Fresno Counties, State of California, etc., et al.,
Defendants.

MEMORANDUM DECISION

(As to Parcels 22, 71, 135, 141, 147, 169, 181 and 217)

This action was instituted by the United States of America to acquire certain property located in Fresno and Kings Counties, California, for the establishment of a naval air station near Lemoore, California. Simultaneously with the filing of a complaint in condemnation the United States filed a declaration of taking, as provided for in 40 U.S.C. 258a. The estate which the Government sought to condemn by the filing of the complaint and declaration of taking was the fee simple title.

The defendant, Southern Pacific Land Company, was the owner in fee of approximately 4,600 acres of land within the area condemned. The property at the time of the taking was being devoted to agricultural purposes.

Upon being served with process in this action the defendant filed an answer objecting to the taking of its

mineral rights, including the oil, gas and hydrocarbon substances, and agreeing to let the court impose reasonable limitations on drilling or production if retained by defendant.

The plaintiff and the defendant entered into a stipulation as to value prior to trial, and reserved the right of the parties to litigate the issue of the right to take the minerals, which was heard by the court without a jury on July 23, 1964. The defendant relied upon three main points in its evidence and its arguments on this issue: (1) that the minerals were not taken for a public purpose; (2) that the Assistant Secretary of the Navy made no determination that the mineral rights were necessary for the project; and (3) if he did, he had acted capriciously, arbitrarily, unreasonably, and had abused his discretion in making his determination to condemn the mineral rights. The Government took the position that the acquisition for the naval air station was for a public purpose as determined by the Congress of the United States and this court had no jurisdiction to review the action of the Assistant Secretary of the Navy in taking the mineral rights of the defendant. The Government declined to present any evidence on necessity or on the basis for the determination by the Assistant Secretary of the Navy to take the mineral rights.

The most recent expression of the Supreme Court on the issue presented to this court is found in *Berman v. Parker,* 348 U.S. 26, in which the court stated:

> "Once the question of public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. See *Shoemaker v. United States,* 147

U.S. 282, 298; *United States ex rel T.V.A. v. Welch,* supra [327 U.S. 546] 554; *United States v. Carmack,* 329 U.S. 230, 247."

In view of the expression of the Supreme Court this court must first determine whether or not the defendant is contesting, in this case, the necessity of the Government to acquire the minerals or raising the question of public use. Whereas the necessity, character and extent of a taking is not subject to judicial review, nevertheless, the question of whether a particular use for which property was condemned is a public use or not is open to judicial review. *United States v. Gettysburg Electric Railway Co.,* 160 U. S. 668; *Shoemaker v. United States,* 147 U. S. 282; *Rindge Co. v. County of Los Angeles,* 262 U. S. 700.

The defendant has urged upon the court the theory that it is contesting the issue of public use, not the issue of necessity. It assumes the position that the minerals are not being taken for a public purpose. Evidence has been introduced by the defendant, in support of its position, that production of oil and gas from the property taken would be incompatible with the use of the land for a master jet air station. The defendant has not, however, questioned the fact that the naval air station, established by the Congress, is a public purpose within the law. There are, in this court's opinion, few purposes which could be determined more necessary or more beneficial to the public welfare of this country than its national defense. The naval air station for which this property was acquired was established for just such a purpose.

The defendant, however, alleges that the taking of the mineral rights is not for a public purpose and has confused the issue of public use with that of necessity. What the defendant is actually urging is that although the acquisition

is for a public purpose, to wit, a naval air station, certain interests condemned are not necessary for that public purpose. As stated in *Berman v. Parker,* supra, "the argument pressed on us is, indeed, a plea to substitute the landowner's standard of public need for the standard prescribed by Congress." This the court cannot do. The determination by the Assistant Secretary of the Navy to take the fee simple title includes by implication a determination that the oil, gas and mineral rights are necessary for the project.

Turning now to the third point upon which the defendant relies in contesting the taking of its minerals (that the Assistant Secretary of the Navy acted arbitrarily, capriciously, and in bad faith), we see that this is directly connected with the question of necessity. Unless one can show lack of necessity he cannot show that the public official to whom Congress delegated the authority to determine the property and interests to be acquired acted in bad faith or arbitrarily. It is well established that Congress may delegate this authority. See *Monongahela Bridge Co. v. United States,* 216 U. S. 177.

The question, it seems, is whether the courts can judicially examine the right of the Government to take certain property or interests in property for public uses where there has been an allegation of bad faith or arbitrary or capricious action by the government official empowered to make such a decision by Congress. This court has found only one reported case that holds the court may review the decision to the extent of determining if the officer authorized by Congress to select the property and estate to be taken acted in bad faith, arbitrarily or capriciously. *United States v. Agee,* 322 F.2d 139. In view of the weight of authority to the contrary, which will be hereafter discussed, this court declines to follow the ruling of the Sixth Circuit. It is true that there are several cases which imply such a "bad

faith exception" to the rule that the court cannot judicially review the determination by the delegated official. *United States v. State of New York,* 160 F.2d 479, and *Simmonds v. United States,* 199 F.2d 305.

The defendants relied heavily upon the Simmonds case, supra, which was decided by the 9th Circuit in 1952. In that case the court held:

> "Discretion as to the extent, amount or title of property to be taken by the United States has been conferred by legislation upon the Secretary of the Army; and in the absence of bad faith or abuse of that discretion his determination is final."

One could assume from this statement that upon a showing of bad faith or abuse of discretion the court could or might hold a taking invalid; however, in the Simmonds case no such showing was made nor did the 9th Circuit Court hold that such was the law.

The 9th Circuit was recently presented with another case which involved this question of the "bad faith exception" to the rule of law that the issue of necessity was not subject to judicial review. In the case of *United States v. Cobb,* 328 F.2d 115, the court said:

> "This court has held in United States v. Carey, 9 Cir., 143 F. 2d, 445, 450, and in United States v. Hayes, 9 Cir., 172 F.2d 677, 679, that when a declaration of taking is filed and deposit is made, title vests in the United States and the district court is powerless to dismiss the proceedings. In accord is United States v. 2,974.49 Acres, 4 Cir., 308 F.2d 641. There was no mention in those cases of a possible question of bad faith. Nor is there any holding that it is within the power of the district court, on the basis of a finding of lack of good faith, to set aside or vacate a declaration of taking. In re United States, 5th Cir., 257 F.2d 844, holds that there is no such power. The statute contains no such provision. If such power exists it must be implied.

> We agree with the Fifth Circuit decision just cited, particularly in view of the fact that there is no contrary authority, and despite a few dicta or references to the possibility of vacating a declaration of taking on the ground of lack of good faith."

The effect of the defendant's claim in this case is to ask this court to vacate that part of the declaration of taking by which the plaintiff took the defendant's mineral rights on the grounds of bad faith on the part of the Assistant Secretary of the Navy.

This is not a case of first impression. The questions of law raised by the defendant's answer have been considered by other circuits as well as the 9th Circuit. This court finds it impossible to distinguish this case from *United States v. State of South Dakota,* 212 F.2d 14, 8 Cir. (1954), where an answer was filed denying the Government's right to take the defendant's mineral rights. The district court held that the mineral rights were taken for a use that was not public and that the mineral rights were not necessary. In reversing, the circuit court held:

> "The determination of what is 'necessary' for the purpose for which the land is sought is delegated by Congress to the Secretary of the Army in this case, *and his decision is not reviewable by the courts.*" (Emphasis supplied)

The question of judicial review of public use and necessity was carefully reviewed and decided by the Fifth Circuit in *United States v. Mischke,* 285 F.2d 628. In that case the district court made a specific finding that the action of the delegated Government official in selecting the property condemned was arbitrary and capricious. The Circuit Court clearly and emphatically ruled that the district court was without jurisdiction to review the determination of the

Secretary of the Army relative to the necessity or expediency of the Government's acquisition.

In this connection it is interesting to note that Congress, in enacting the so-called Declaration of Taking Act, 40 U.S.C., 258a, provided:

> "Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto;"

Although Congress specifically enumerated the powers delegated to the courts under this act, in the last two paragraphs thereof it did not qualify the statute in any manner by granting to the court's jurisdiction to review the decision made on the estate to be condemned.

The defendants in the present case took the depositions of Mr. F. A. Bantz, former Assistant Secretary of the Navy, as well as the depositions of navy and civilian personnel stationed at the naval air station. Portions of these depositions were offered in evidence at the hearing on the Government's right to take the minerals. This court has found no evidence to support an allegation that the Assistant Secretary of the Navy acted in bad faith or arbitrarily or capriciously; however, since it is the opinion of this court that no jurisdiction exists to review the Secretary's action further discussion of this point is unnecessary.

It is the opinion of this court, based upon the cases cited herein and the applicable statutes, that the issue raised by the defendant, Southern Pacific Land Company, involves

one of necessity rather than one of public use or public purposes. The fact that the property may or may not be used for the public purpose involves a question of necessity and not one of public use. The fact that the Government may or may not conduct mining or drilling operations on the property is as immaterial as whether it will or will not put runways or other improvements on the specific property condemned. There is no rule of law known to this court that requires the Government to put every acre of land taken, or every interest taken, to a specific use. *U. S. v. Willis,* 211 F.2d 1 (8th Cir.). The use for which the subject property was condemned in this action was a public use. The extent, nature or estate to be acquired is solely within the province of the Assistant Secretary of the Navy by delegation from Congress and is not subject to judicial review.

Therefore, judgment shall be entered that the plaintiff, United States of America, had and has the right to condemn the estate and interests set forth in its complaint and declaration of taking on file herein, including the mineral rights of the defendant, Southern Pacific Land Company.

Dated: August 31, 1964.

M. D. CROCKER
United States District Judge

Constitutional Provisions and Statutes

CONSTITUTION OF UNITED STATES, AMENDMENT V

"Criminal Proceedings and Condemnation of Property

"Section 1. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual serv-

ice in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation." (Emphasis added.)

CONDEMNATION OF REALTY FOR SITES AND OTHER USES, TITLE 40 U.S.C.A. SECTION 257

"In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building *or for other public uses,* he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice." (Emphasis added.)

DECLARATION OF TAKING ACT, TITLE 40 U.S.C.A., SECTION 258a

"In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. *Said declaration of taking shall contain or have annexed thereto—*

"(1) A statement of the authority under which and the public use for which said lands are taken. . ." (Emphasis added.)

PUBLIC LAW 968, 70 UNITED STATES STATUTES 991

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

• • • •

"Sec. 201. The Secretary of the Navy may establish or develop military installations and facilities by acquiring, constructing, converting, rehabilitating, or installing permanent or temporary public works, including site preparation, appurtenances, utilities and equipment, for the following projects:

• • • •

"Naval air station, Lemoore, California: Plans and specifications for development of master jet aircraft facilities, and land acquisition, $10,089,000. . ."

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1059

SOUTHERN PACIFIC LAND COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1958, the government began condemnation proceedings in the United States District Court for the Southern District of California to acquire fee title to more than 17,750 acres of land in that district for the Lemoore Naval Air Station. In its answer to the complaint (2 R. 360–362), petitioner, the owner of some 4,600 acres of the land involved, opposed the taking of fee title and requested the court to limit the estate taken by the government by reserving to petitioner all mineral rights, subject to restrictions on their exploitation necessary to avoid interference with the operation of the air station. Petitioner alleged that the government's failure so to restrict its declaration

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of taking was "unreasonable, capricious, arbitrary and an abuse of discretion" (2 R. 361).

After lengthy proceedings, the district court rejected petitioner's contentions and ruled that the government was entitled to take the estate described in its complaint and declaration of taking. The court held that "the necessity, character and extent of a taking is not subject to judicial review" (Pet. App. 8) and that, in any event, there is "no evidence to support the contention that the Assistant Secretary of the Navy acted in bad faith or arbitrarily or capriciously" (Pet. App. 12). The court of appeals affirmed (Pet. App. 1–5; 367 F. 2d 161). That court found it unnecessary to pass on the principal question tendered by the petitioner here—*i.e.*, whether there may be judicial review of a decision to condemn particular property or a particular property interest where the decision is alleged to be arbitrary or capricious. The court ruled, rather, that, even if such a limited power exists, the decision must be affirmed, "since we agree with the district court that [petitioner] failed to show that the decision to take its mineral rights was arbitrary, capricious, or made in bad faith" (Pet. App. 3).

The decision below was correct and does not warrant review by this Court. It is well settled that, where property is taken for a public use, it lies within the discretion of the condemning agency to determine whether to take fee title or some lesser estate. See, *e.g.*, *United States* v. *91.69 Acres of Land*, 334 F. 2d 229, 231–232 (C.A. 4); *Lewis* v. *United States*, 200 F.

2d 183 (C.A. 9); *United States* v. *Meyer,* 113 F. 2d 387, 392 (C.A. 7); cf. *United States* v. *64.88 Acres of Land,* 244 F. 2d 534 (C.A. 3). This Court recently reaffirmed the principle in *Berman* v. *Parker,* 348 U.S. 26, where it was contended, *inter alia,* that the government did not need fee title to the land involved to effectuate its urban redevelopment program and should be limited to taking title to the offensive buildings. The Court there stated (348 U.S. at 35–36):

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. See *Shoemaker* v. *United States,* 147 U.S. 282, 298; *United States ex rel. T.V.A.* v. *Welch,* [327 U.S. at] 554; *United States* v. *Carmack,* 329 U.S. 230, 247.
>
> The District Court indicated grave doubts concerning the Agency's right to take full title to the land as distinguished from the objectionable buildings located on it. 117 F. Supp. 705, 715–719. We do not share those doubts. If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the

> function of the courts to sort and choose among the various parcels selected for condemnation.
>
> The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.

See, also, *Starr* v. *Nashville Housing Authority*, 354 U.S. 916, affirming *per curiam* 145 F. Supp. 498 (M.D. Tenn.).

Petitioner contends, however, that the courts are not absolutely prohibited from reviewing the exercise of this discretion and that judicial review is available where it is alleged that the taking, encompassing more than is absolutely necessary to the public use involved, is "arbitrary" or "capricious." As the court below noted, there are *dicta*[1] in a number of decisions to the effect that limited judicial review is permissible to protect against arbitrary action. *E.g., 2,935.15 Acres of Land* v. *United States*, 350 F. 2d 356, 359 (C.A. 5); *Wilson* v. *United States*, 350 F. 2d 901, 907 (C.A. 10); *United States* v. *64.88 Acres of Land*, 244 F. 2d 534, 536 (C.A. 3); *Simmonds* v. *United States*, 189 F. 2d 305, 306 (C.A. 9). A typical statement is the Fourth Circuit's, in *United States* v. *91.69 Acres of Land*, 334 F. 2d 229, 232, that "it is at least theoretically conceivable that a case of arbitrary, capri-

[1] In *United States* v. *Agee*, 322 F. 2d 139, 142 (C.A. 6), the court expressly held "that the District Court was correct in reviewing the decision of the condemning authority to the extent of determining whether the decision was made in bad faith * * *." The court went on to hold that the decision to take land above the high water mark, not strictly necessary to the river improvement project in question, was not made in bad faith and was therefore permissible.

cious or corrupt conduct might arise which would call for judicial intervention." On the other hand, there are cases which "state flatly that the legislative or administrative determination of the taking required for a public use is not open to judicial inquiry." *United States* v. *New York*, 160 F. 2d 479, 480 (C.A. 2), and cases cited. And the Eighth Circuit has so held in a case analogous to the case at bar. *United States* v. *Mischke*, 285 F. 2d 628.[2]

This case presents no occasion for this Court to declare, as petitioner requests, which of these statements accurately reflects the law—*i.e.*, to pronounce whether or not there is indeed an absolute bar to judicial inquiry into the extent of a taking found, in general, to be for a public use. For it is clear, as the courts below found, that the acquisition of fee title in this case was within the permissible discretion of the taking agency. A much stronger showing than that made by petitioners is required to support a conclusion that the taking of fee title to land for the construction of an air station is not an authorized taking for a "public use". It is not a requisite of eminent domain that every inch of the land condemned or every attribute of the title taken must be essential to, or even utilized in, the project. See *United States ex.*

[2] The district court had found that 42.5 acres of the land taken were not needed for flood control, the declared purpose of the taking, and that this portion of the taking was arbitrary and capricious. The court of appeals assumed the correctness of the lower court's findings, but held that the trial court "lacked authority" to review the necessity of the taking of the 42.5 acres (285 F. 2d at 631).

rel. Tennessee Valley Authority v. *Welch*, 327 U.S. 546; *Brown* v. *United States*, 263 U.S. 78, 82; *United States* v. *Agee*, 322 F. 2d 139, 142–143 (C.A. 6); *United States* v. *Mischke*, 285 F. 2d 628, 631–33 (C.A. 8).

Petitioner relies on the deposition testimony of Fred A. Bantz (2 R. 111–131), who was an Assistant Secretary of the Navy at the time of the taking and, in that capacity, signed the declaration of taking involved here. This testimony does not establish that the taking of fee title was arbitrary or capricious.[3] On the contrary, as the court below noted, "the uncontradicted testimony of the Assistant Secretary was that he based his decision in part upon the fact that the existence of outstanding mineral interests, conflicting with possible surface uses, would reduce the marketability of the property in the event of sale" (Pet. App. 4). And, as the court further noted, "[a]dvantageous liquidation of the Government's investment is a legitimate consideration in determining the estate to be taken." See *Lewis* v. *United States*, 200 F. 2d 183, 185 (C.A. 9); *United States* v. *New York*, 160 F. 2d 479, 481 (C.A. 2); cf. *United States ex rel. Tennessee Valley Authority* v. *United States*, 327 U.S. 546, 554; *Old Dominion Land Company* v. *United States*, 269 U.S. 55, 66.

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[3] The deposition was taken more than six-and-a-half years after the declaration of taking (2 R. 111, 225–227) and more than five years after Mr. Bantz left the position of Assistant Secretary (2 R. 112). Mr. Bantz noted that he was only "somewhat" able to refresh his recollection of the events surrounding the taking from the government's files (2 R. 116).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 1059

SOUTHERN PACIFIC LAND COMPANY,
Petitioner

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply to Memorandum in Opposition to Writ of Certiorari

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In its memorandum, the United States again confirms the position taken by petitioner that the decisions of the Federal Courts passing upon the jurisdiction or power of a court to review the determination of an administrative agency to take a specific estate in private property, where factually there has been no determination even by that agency that the taking is necessary to accomplish the authorized public purpose and where it is claimed that such taking is arbitrary or capricious, are in hopeless conflict and confusion. At pages 4 and 5 of its memorandum, the United States cites decisions holding both ways. It characterizes the de-

cisions holding contrary to its position as dicta but a reading of those cases will demonstrate that the statements referred to were not always dicta.

These decisions were all carefully briefed and analyzed in the briefs presented to the Circuit Court. We ask that the writ prayed for be granted and that we have an opportunity to brief and analyze those cases for this Court.

The United States refers particularly to the decision of this Court in *Berman v. Parker*, 348 U.S. 26. That was an action by the owners of real property to enjoin a condemnation pursuant to the District of Columbia Redevelopment Act of 1945. The Act authorized the Redevelopment Agency to acquire real property by eminent domain for the redevelopment of slum areas in the District of Columbia. The Agency attempted to take appellant's land upon which a department store was located. Appellant objected that this property could not be taken constitutionally because it was commercial and not residential property and did not constitute slum housing and because the Redevelopment Agency intended to place the property under private management for private and not public use. The Supreme Court held that the Act was a proper exercise of the police power and was constitutional and that it was immaterial that the purposes of the Act were to be carried out by private enterprise. The Court further held that it was within the authority of Congress to attack the problem on an area basis rather than by a structure basis. The Court stated:

> "The District Court indicated grave doubts concerning the Agency's right to take full title to the land as distinguished from the objectionable buildings located on it. 117 F. Supp. 705, 715-719. We do not share those doubts. If the Agency *considers it necessary in carrying out the redevelopment project* to take full title to the real property involved, it may do so."

This case determines just two things: (1) that the Act of Congress under which the taking was authorized was constitutional as an exercise of the police power and (2) that *when* the agency created under the Act *exercised its discretion to determine that the use of the entire property was necessary* to the successful consummation of the authorized project, it was not for the Court to question the soundness of that exercise of discretion. The Court did not hold that it lacked jurisdiction to protect the property owner against the taking of his property where there had been no proper exercise of such discretion and no determination that the property was necessary for the consummation of the project or would in fact be used for any purpose connected with the project.

The *Berman* case differs from the case at bar in that it did not involve a plea or claim that the action of the Redevelopment Agency was arbitrary, capricious or an abuse of its discretion. It was expressly pointed out in the lower court (*Schneider v. District of Columbia,* 117 Fed. Supp. 705 at 725) that the issue of arbitrary or capricious action was not pleaded and therefore was not at issue. The Supreme Court in its decision did not refer to any claim of arbitrary or capricious conduct and did not pass or comment on whether any such defense would be a proper matter for court review.

In the present case, the Assistant Secretary of the Navy did not in the exercise of his discretion determine that the taking of mineral or oil or gas rights was required for the purposes of the air base for which a taking was authorized. He testified under oath that he knew just the opposite was true. It was pleaded that under these circumstances the taking was arbitrary, capricious and an abuse of discretion.

If petitioner is given the opportunity to completely brief this question for this Court, it will demonstrate that no case has been cited by the United States which upholds a taking of private property where the decision to take was made without first making a determination that its taking was necessary or advantageous to a use authorized by statute or where the officer making the decision to take testified concerning his determination of the necessity for the taking that the property could not be used and was not intended to be used for the purpose authorized. To our knowledge, the case at bar is a case of first impression where such testimony is present.

In its memorandum, the United States now suggests that there is no occasion for this Court to declare which line of decisions found in the federal cases accurately reflects the law or to pronounce whether or not there is indeed an absolute bar to judicial inquiry into the taking. Suffice it to say that the United States has not heretofore taken this position. At the trial the United States refused to present witnesses or even to cross-examine witnesses upon the ground that there was an absolute bar to judicial inquiry and that it was entitled to a decision to this effect. The position of the United States was so definite that the judge of the District Court based his judgment solely upon that ground.

In its memorandum, the United States continues to state that the trial court held there was no evidence to support the contention that the Assistant Secretary of the Navy acted in bad faith or arbitrarily or capriciously. In this, it continues to ignore the findings and conclusions signed and filed by the District Judge which based the decision entirely upon lack of jurisdiction. This was done advisedly and we believe the findings and conclusions were so drawn

in order that this specific question could be submitted to this Court for a final decision.

Petitioner's prayer for a writ of certiorari should be granted.

Respectfully submitted,

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